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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the nonstatutory labor exemption to the antitrust laws immunizes from antitrust scrutiny all concerted restraints on competition for the services of unionized employees that are unilaterally imposed by a multiemployer cartel, so that employees must forgo collective bargaining in order to challenge such restraints under the antitrust laws.

PARTIES TO THE PROCEEDING

Petitioners are a class of 235 professional football players who played on developmental practice squads of the 28 member clubs of the National Football League during the 1989 season. The named petitioners are Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett and John Simpson, each of whom was a named plaintiff in Civil Action No. 90-1071, a class action brought in the United States District Court for the District of Columbia. Petitioners were appellees in consolidated case Nos. 93-7165 and 94-7071 in the United States Court of Appeals for the District of Columbia Circuit.

Respondents are the National Football League ("NFL" or "League"), an unincorporated association of professional football clubs, and the 28 separate business entities that operated clubs in association with the NFL during the 1989 season (or their successors): Pro-Football, Inc., d/b/a Washington Redskins; The Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; The Detroit Lions, Inc., d/b/a Detroit Lions; Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; Los Angeles Raiders, Ltd., d/b/a Oakland Raiders; Los Angeles Rams Football Company, Inc., d/b/a St. Louis Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; KMS Patriots, L.P., d/b/a New England Patriots; The New Orleans Louisiana Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a

New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; The Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; B & B Holdings, Inc., d/b/a Phoenix Cardinals; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; The Chargers Football Company, d/b/a San Diego Chargers; The San Francisco Forty-Niners, Ltd., d/b/a San Francisco Forty-Niners; The Seattle Professional Football Club, d/b/a Seattle Seahawks; and Tampa Bay Area NFL Football, Inc., d/b/a Tampa Bay Buccaneers. Respondents were defendants in the District Court and appellants in the Court of Appeals.

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BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

This case presents a much-anticipated opportunity for the Court to clarify the limitations of the so-called "non-statutory labor exemption" to the antitrust laws—a judicially created antitrust immunity that is justified only as necessary to avoid conflicts between the Sherman Act's goal of free competition in all markets, including labor markets, and the national labor relations policy favoring collective bargaining agreements over wages and other terms and conditions of employment.

Consistent with this Court's precedents, lower courts have generally confined the reach of the exemption to

employment terms that are mutually agreed to by employers and employees through good faith collective bargaining. In its opinion below, however, the Court of Appeals vastly expanded this judge-made exemption to immunize from antitrust scrutiny a concerted salary-fixing arrangement that the member clubs of the National Football League unilaterally imposed on a narrow group of practice players after declaring an impasse in labor negotiations. Although the football players' bargaining representative had never agreed to the League's salary fix, a majority of the Court of Appeals held that all such multi-employer restraints on labor competition are exempt from antitrust review with or without employee consent simply by virtue of the employees' decision to engage in collective bargaining.

The dramatically expansive antitrust immunity adopted below violates the basic limitations on a court's power to read implied exemptions into the federal antitrust laws and, unless overturned, will inevitably be destructive of the very labor policies invoked to justify it. This Court should reverse the judgment of the Court of Appeals and return the nonstatutory labor exemption to its original and proper mooring: employee consent embodied in a written agreement.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 50 F.3d 1041 (1995) and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at pages 1a-60a. The Court of Appeals' orders denying rehearing and rehearing *in banc* are reprinted at Pet. App. 61a-63a. The opinion of the Court of Appeals reversed a memorandum opinion and order of the United States District Court for the District of Columbia granting petitioners' motion to strike respondents' nonstatutory labor exemption defense and denying respondents' cross-motion for summary judgment as to the nonstatutory labor exemption. The Dis-

trict Court's memorandum opinion and order on the nonstatutory labor exemption are reported at 782 F. Supp. 125 (1991) and reprinted at Pet. App. 64a-92a. The District Court's memorandum opinion and order granting petitioners' motion for summary judgment on antitrust liability are reported at 1992-1 Trade Cas. (CCH) ¶ 69,747 and reprinted at Pet. App. 93a-115a. The District Court's opinion denying respondents' motion for reconsideration on the issue of liability is reprinted in the joint appendix ("J.A.") at pages 120-24. The District Court's award of damages to petitioners following a jury trial is reported at 1993 Trade Cas. (CCH) ¶ 70,260 and reprinted at J.A. 125-32, and its order permanently enjoining respondents from collectively fixing player salaries is reported at 821 F. Supp. 20 (1993) and reprinted at J.A. 133-34.

JURISDICTION

The Court of Appeals issued its opinion on March 21, 1995. Pet. App. 1a. Petitioners filed a timely petition for rehearing, which the Court of Appeals denied on June 12, 1995. *Id.* at 61a. Petitioners filed their petition for certiorari on September 11, 1995. This Court granted certiorari on December 8, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

> respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, states:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

STATEMENT OF THE CASE

Petitioners are a class of 235 professional football players who served on practice squads for NFL clubs during the 1989 football season. Petitioners brought this antitrust action alleging that respondents—the NFL and its 28 member clubs—violated § 1 of the Sherman Act by combining to adopt and enforce a uniform fixed salary for practice squad players that eliminated any opportunity for competitive bidding among the NFL clubs for petitioners' services.

This case is representative of numerous antitrust actions challenging restraints on competition for players' services in the NFL and other professional sports leagues that have arisen since this Court decided in *Radovich v. NFL*, 352 U.S. 445 (1957), that the antitrust laws have full application to restraints on players' services in football and every other sport (except, for peculiar historical reasons, baseball). *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (reaffirming *Radovich*). In the world of professional team sports, as in similarly structured industries like entertainment, there is a critical interplay between employees' individual antitrust rights and the collective bargaining regime of the National Labor Relations Act. Employees in these industries have organized into collective bargaining associations precisely to *preserve* an area of effective competition among employers for the services of highly talented individuals. The present case goes to the heart of this fundamental interplay between the federal labor laws and the antitrust laws.

The critical facts are these: In 1989, the NFL clubs decided amongst themselves to establish "developmental squads" of practice/replacement players and, purely to save money, decided to eliminate salary competition by requiring each NFL club to pay every developmental squad player a uniform fixed salary of $1,000 per week, or a total of $16,000 per season. In prior seasons, the salaries for comparable players had been set through individual negotiations and in the 1988 season had averaged just under $4,000 per week. Respondents attempted to persuade the players' association to agree to the scheme in collective bargaining. Although the players' association was in favor of the developmental squad concept, *it rejected the clubs' insistence upon a fixed salary for all such players, something that had never before been part of professional football.* Respondents then declared an impasse in negotiations and unilaterally implemented the $1,000 per week salary for petitioners, thereby saving themselves more than $10 million in payroll costs for the 1989 season.

The District Court (Lamberth, J.) rejected respondents' defense that their unilateral imposition of a concerted salary restraint was shielded from antitrust review by the nonstatutory labor exemption. On the merits, the District Court ruled that respondents' fixed salary was an unreasonable restraint on competition in violation of § 1, and a jury found that petitioners had been financially harmed and were entitled to more than $10 million in aggregated compensatory damages. Without reaching the merits, a divided panel of the Court of Appeals reversed. The majority concluded that the NLRA broadly precludes any antitrust inquiry into the reasonableness of a restraint on labor services that is unilaterally imposed by employers in the context of a collective bargaining relationship.

A. Statement of Facts

The National Football League is the sole major professional football league in the United States. J.A. 50. The clubs that comprise the League jointly produce and market professional football games, but they remain separate and distinct business entities that compete with one another to acquire the services of football players. *Id.* at 58, 74.[1] By acting in concert to depress the prices they pay for players' services, the NFL clubs can collectively exercise monopsony power in the market for top-level football talent, since the players have no comparable alternative buyers for their uniquely valuable athletic skills. Pet. App. 39a-41a (Wald, J., dissenting).

Thus, unlike those employees who have traditionally organized into unions for the purpose of eliminating labor

[1] There were 28 member clubs associated with the NFL during the 1989 season. Two of the respondent clubs have since moved to different cities—the Los Angeles Rams are now the St. Louis Rams, and the Los Angeles Raiders are once again the Oakland Raiders. In addition, two new clubs have joined the League, the Carolina Panthers and the Jacksonville Jaguars, neither of which is a respondent in this case.

market competition, professional football players formed their bargaining organization, the NFL Players Association, largely to *promote inter-club competition* by removing and resisting devices (such as reserve clauses) that NFL owners have historically adopted to suppress free agency and competitive bidding for players' services. *Id.* at 36a n.2. The Players Association is the exclusive bargaining representative under the NLRA for all NFL players, including petitioners. J.A. 58-59. As long as the players have been represented by the Players Association (and before), every player's salary has been determined through individual negotiation with the clubs, subject only to certain minimum salary levels specified, when applicable, in a collective-bargaining agreement. At no time in the course of bargaining with respondents has the Players Association ever consented to a fixed regular season salary for any category of NFL player.

In 1982, the Players Association entered into a collective bargaining agreement with the clubs' bargaining representative, the NFL Management Council. Consistent with the position long maintained by the Players Association, the 1982 agreement guaranteed all players the right to negotiate their own individual salaries. The 1982 agreement expired at the end of August 1987. Pet. App. 70a.[2]

In February 1989, two committees of NFL club owners —the Finance Committee and the Long Range Planning Committee—met jointly and formulated a plan known as "1989 Resolution G-2," which created the concept of developmental squads. Pet. App. 65a. The players on developmental squads would serve as practice players in scrimmages with the clubs' active roster players and would be available to suit up and play in NFL games, but only as replacements for active players. Under Resolution G-2, each club would be allowed to sign no more

[2] No succeeding collective bargaining agreement for NFL players was reached until 1993.

than six rookie or first-year free agents to developmental squad contracts and would be required to pay each developmental squad player a uniform fixed weekly salary. *Ibid.*[3] At their annual meeting on March 22, 1989, the NFL owners in Executive Session voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws to establish developmental squads.

The primary purpose of the fixed-salary concept was "to save [the clubs] money," as respondents "frankly admitted." *Id.* at 57a-58a (Wald, J., dissenting). *See id.* at 98a; J.A. 61-62. In prior seasons, developmental squad functions were performed by "injured reserve" players who had negotiated individual contracts with the NFL clubs.[4] Twenty members of the petitioner class, for example, had practiced with their teams as injured reserve players in 1988 and had received individually negotiated salaries that averaged just over $3,750 per week. J.A. 86; Pet. App. 95a-99a. Requiring all clubs to pay a uniform fixed salary for developmental squad contracts would prevent these players from individually negotiating competing salary offers from the clubs.[5]

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[3] Rookies were defined as players who had not previously been under contract to a professional football team. First-year players were those who had been active in another professional football league or whose NFL experience was limited to training camp or fewer than three games on an active roster. Pet. App. 94a n.3. Resolution G-2 also required the clubs to negotiate a standard player contract with each developmental squad player to establish salary and other terms that would become effective if the player later made the active roster. J.A. 13, 42.

[4] Under the NFL's Constitution, "injured reserve" players were those who, because of an injury, were placed on a reserve roster and were not permitted to play in games, though they could practice with their teams as soon as they were physically able. *See* Pet. App. 96a-97a. In 1988, such players could be moved to the active roster and play in games, just as the developmental squad players could in 1989.

[5] The terms of the resolution permitted clubs to sign players to developmental squad contracts on September 5, 1989, the day after

On April 7, 1989, the Executive Director of the Management Council, Jack Donlan, sent a letter with a copy of Resolution G-2 to Gene Upshaw, the Executive Director of the Players Association. J.A. 11-15. Donlan informed Upshaw of the NFL's adoption of Resolution G-2 and suggested a meeting "to negotiate . . . the terms and conditions applicable to developmental squad players." *Id.* at 11; Pet. App. 65a-66a. *See id.* at 69a.

On May 17, 1989, several owners who were members of the League's Management Council met and agreed among themselves that all developmental squad players would be paid a fixed salary of $1,000 per week for the regular season and any post-season weeks. *Id.* at 66a. This arrangement guaranteed that practice players would be limited to a total compensation of $16,000 for the 1989 regular season. Resolution G-2 had the purpose and effect of replacing the higher individually negotiated salaries received by injured reserve practice players in 1988 with a flat $1,000 fixed salary for 1989. *See* J.A. 84-89, 94-95; Pet. App. 95a-99a. As it would turn out, the number of developmental squad players in 1989 corresponded one-for-one with a reduction in the number of injured reserve players, *see* J.A. 94-95, and Resolution G-2 succeeded in saving the clubs a total of more than $10 million at the expense of these practice players.[6]

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the clubs were required to reduce their rosters to 47 regular players. *See* J.A. 41, 60. A player was eligible for a developmental squad if he failed to make the cut for the regular roster and was not claimed by another team in the pre-season "waivers" process—*i.e.*, no other club had signed him to a contract for its regular roster. *See* Pet. App. 7a-8a; J.A. 67. At that point, the player became a "free agent" and, *if the League had not mandated a fixed salary*, would have been able to solicit competing bids from different clubs for his services as a developmental squad player.

[6] Contrary to respondents' assertion that the $1,000 figure was "slightly less than the collectively bargained minimum salary for regular roster players," Opp. to Pet. for Cert. 3, the minimum

On May 18, the day after the owners settled on the $1,000 figure, Donlan of the Management Council sent the Players Association a second letter requesting negotiations over the terms and conditions for developmental squad players and proposing the following modification to the 1982 collective bargaining agreement with respect to such players:

> "Article XXII, *Salaries*, shall not apply. In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis.
>
> ". . . Article XXVIII, *Post-Season Pay*, shall not apply." J.A. 17, 63; Pet. App. 66a.

Upshaw of the Players Association wrote back on May 30 stating that the Players Association was willing to agree to the developmental squad concept, but only if developmental squad players received the same benefits and protections afforded other players, "includ[ing] the right to negotiate their own salaries." J.A. 18, 63; Pet. App. 66a. On June 16, after a meeting with the Players Association, Donlan wrote an internal memorandum to members of the Management Council informing them that the Players Association "could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary." Donlan concluded that "[f]or implementation purposes, the issue is clearly at impasse." J.A. 19-20, 64; Pet. App. 66a. The Players Association sent the Management Council a follow-up letter on July 6 reiterating the position "that all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." J.A. 23, 65; Pet. App. 67a.

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salary for rookie players on the regular roster in 1986—the last season covered by the 1982 agreement—was $50,000 per season, or $3,125 per week. *See* Court of Appeals Joint Appendix ("Ct. App. J.A.") 133.

The League then unilaterally implemented Resolution G-2 by distributing a uniform developmental squad player contract that all clubs were required to use. Pet. App. 7a. The Management Council advised the clubs on August 22, 1989, that "[w]eekly compensation to be paid to Developmental Squad Players is $1,000" and "[i]ndividually negotiated terms above or below $1,000 are not permitted." J.A. 66. On August 24, NFL Commissioner Pete Rozelle sent a memorandum to all clubs threatening disciplinary action for any violation of the fixed salary scheme:

> "All signings must be on the Developmental Squad contract, which was previously provided to you. All players on the Developmental Squad will be paid a salary of $1,000 per week. Any other direct or indirect compensation provided to Developmental Squad players is impermissible, and clubs violating this provision will be subject to appropriate discipline, including the loss of draft choices." *Ibid.*; Pet. App. 7a.

On September 4, 1989, the day before the clubs began signing developmental squad players, Commissioner Rozelle distributed another memorandum reminding the clubs that "[i]ndividually negotiated terms above or below $1,000 are not permitted" for developmental squad players. J.A. 67-68; Pet. App. 67a. "This means," he added, "that Developmental Squad players may not receive any other compensation or benefit from the club, directly or indirectly, in any form. Housing arrangements, per diem, and any other form of compensation or benefit are impermissible." J.A. 68; Pet. App. 67a.

B. Proceedings Below

The named petitioners filed this action on May 9, 1990, on behalf of themselves and all players who had signed developmental squad contracts for the 1989 season. Petitioners sought damages and injunctive relief on the claim

that respondents' concerted imposition of the $1,000 per week fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act. J.A. 29-40.[7] Respondents invoked the nonstatutory labor exemption as a defense, *id.* at 50, and the parties filed cross-motions for summary judgment on the applicability of the exemption. *Id.* at 55-57, 70-71.

The District Court ruled that respondents' restraint was not entitled to antitrust immunity. Pet. App. 64a-92a. The court concluded, first, that any immunity available to respondents had expired with the parties' 1982 bargaining agreement, *id.* at 72a-80a; second, that in the alternative the exemption could not extend beyond the point when the parties had reached impasse in negotiations over a successor agreement, *id.* at 80a-86a; and, finally, that the exemption was inapplicable because the Players Association had never agreed to the fixed salary, *id.* at 86a-90a.

In a subsequent ruling, the District Court granted petitioners' motion for summary judgment on antitrust liability. *Id.* at 93a-115a. The court found that respondents' salary-fixing restraint "necessarily eliminated all competition and prevented prospective Developmental Squad players from negotiating salary terms among interested NFL clubs." *Id.* at 111a. The restraint "robbed each seller of football services of any bargaining power, left no room for competition among the teams for the services of rookie and first year players, and utterly stripped them of any measure of control over the marketing of their talents." *Ibid.* (internal quotation marks and brackets omitted). The court found no procompetitive purposes that could justify the restraint. *Id.* at 111a-114a.[8]

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[7] Shortly after petitioners filed suit, respondents discontinued the fixed-salary developmental squads.

[8] Respondents produced no contemporaneous documents to support their claim that Resolution G-2 was adopted to promote greater on-field competition—a claim first articulated in opposition to sum-

A jury trial was held on damages. Based on evidence that the 235 petitioners would have earned an average of $5,189 per week as developmental squad players during the 1989 season if not for respondents' concerted elimination of competition, the jury found aggregated damages for the petitioner class in the amount of $10,116,547. The District Court trebled the award pursuant to § 4 of the Clayton Act and entered judgment against respondents for $30,349,642. J.A. 125-32. The District Court also permanently enjoined respondents from conspiring to fix regular season salaries for NFL players. *Id.* at 133-34.

A divided panel of the Court of Appeals reversed solely on the basis of the nonstatutory labor exemption. Pet. App. 1a-60a. The majority, in an opinion by Chief Judge Edwards, held that the exemption "shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. Although acknowledging that the Sherman Act would ordinarily apply to restraints imposed by a combination of employers on the labor market, the majority reasoned that "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime," *id.* at 24a, and from that point onward the Sherman Act "necessarily is replaced by the NLRA paradigm of organized negotiation." *Id.* at 25a. In short, according to the majority:

> "[T]he nonstatutory labor exemption requires employees involved in a labor dispute to choose whether

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mary judgment. *See* J.A. 90. The League's Competition Committee, which was responsible for "competitive aspects of the game," had no involvement in the formulation of Resolution G-2, and only one of its five members preferred the establishment of developmental squads over the existing system. *See* Ct. App. J.A. 698-99, 704-06, 990-91, 2505-06.

to invoke the protections of the NLRA or the Sherman Act. If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions." *Id.* at 30a.

In dissent, Judge Wald characterized the majority's rule as "contrary to the purposes of *both* the labor laws and the antitrust laws" because it "ousts antitrust law only to encourage fewer collective bargaining agreements." *Id.* at 49a (emphasis in original). Judge Wald concluded that a blanket antitrust exemption for multi-employer restraints would create perverse incentives for the parties to labor disputes: Employers would have "new incentives to harden their bargaining positions" and force negotiations to impasse so as to impose their preferred restraints without fear of antitrust scrutiny. *Id.* at 46a-47a. At the same time, the total ouster of antitrust rights would discourage employees from entering into collective bargaining relationships and would lead to union decertifications, results that "run directly contrary to the overarching purpose of the labor laws to encourage bona fide collective bargaining." *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

The decision of the majority below represents a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws. In broadening the nonstatutory labor exemption to immunize all labor market restraints imposed by employers in industries where there is collective bargaining, the Court of Appeals seriously breached the cardinal principles of statutory construction that strictly confine the power of courts to declare implied repeals of the Sherman Act.

There is no clear repugnancy between the Sherman Act and the National Labor Relations Act that necessitates a blanket repeal of antitrust law for unionized labor markets. As developed and applied by this Court and the majority of lower courts, the nonstatutory labor exemption properly protects restraints on the terms of em-

ployment only when those restraints are the product of mutual consent in collective bargaining agreements between employers and employees. A narrow labor exemption limited to such consensual restraints respects the well-established interest of the Sherman Act in scrutinizing the reasonableness of concerted conduct by employers that eliminates competition over terms of employment. So narrowed, the exemption also effectuates the NLRA because it does not impede or penalize the exercise of employees' § 7 rights and, at the same time, preserves the legal "backdrop" for collective bargaining that Congress intended to maintain.

The reasons advanced by the Court of Appeals fail to justify ousting the Sherman Act from the collective bargaining relationship. The panel majority's desire to adjust the relative bargaining power of employees and employers under the NLRA reveals a policy judgment that cannot legitimately support its decision. The court's belief that employees who organize for collective bargaining forfeit their rights to negotiate individual employment terms in a competitive market cannot be squared with the collective bargaining experience in professional sports where players' associations have consistently preserved a role for such competition.

Nor was the court correct in assuming that employers have a "right" to impose their own terms upon impasse that is protected by the NLRA. That "right" is derived from the common law and is subject to generally applicable background laws, including the antitrust laws; moreover, this Court's recent implied labor preemption decisions fully support the distinction between an employer's use of core economic weapons, on the one hand, and the unilateral imposition of new terms of employment without a bargaining agreement. Finally, there is no basis for the court's assumption that antitrust law threatens multi-employer bargaining. Congress specifically intended employer associations to remain subject to the

antitrust laws. A carefully tailored exemption that preserves antitrust scrutiny for the concerted imposition of employment terms leaves employer associations free to resort to a panoply of economic weapons to achieve their preferred results through the collective bargaining process.

The expansive antitrust exemption devised by the Court of Appeals would create perverse incentives for both employers and employees that would inevitably lead to a breakdown of collective bargaining relationships in direct contravention of the NLRA. The potential for harm to labor-management relations from such blanket immunity is evidenced by the recent turbulent experience throughout professional sports. Such strife confirms that the broad exemption adopted below cannot possibly advance the goals of national labor policy.

Accordingly, this Court should reverse the judgment below. A properly limited nonstatutory labor exemption shields concerted restraints on employment terms only when employees consent to those restraints through a written collective bargaining agreement. Consistent with the exemption's basis in employee consent, the antitrust immunity should end when the parties' bargaining agreement has expired and the employees have indicated that they no longer consent to the continuation of such concerted restraints.

ARGUMENT

Courts have no license to ignore one federal statute in favor of another: They must give effect to both laws whenever possible. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). That fundamental principle of statutory construction has particular force when applying the Sherman Act—the basic expression of our national belief that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). In the Sherman Act, Congress intended to exercise its commerce power to the

maximum extent permitted by the Constitution. *McLain v. Real Estate Bd.*, 444 U.S. 232, 241-42 (1980).

Implied repeals of the Sherman Act are therefore highly disfavored. "Implied antitrust immunity," this Court has held, "can be justified only by *a convincing showing of clear repugnancy*" between the Sherman Act and the competing statute. *National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388 (1981) (emphasis added). *See Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [competing statute] work, and even then *only to the minimum extent necessary*," since "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another *rather than holding one completely ousted.*") (emphasis added); *Borden Co.*, 308 U.S. at 198-99. *See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (all antitrust exemptions, including implied exemptions, must be narrowly construed).

These recognized principles define the contours of the nonstatutory labor exemption. As an implied repeal of the Sherman Act, the exemption is justified only to the extent that "labor policy requires," *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975), and only when application of the antitrust laws affirmatively "conflicts with" the NLRA's collective bargaining scheme, *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965). *See also Group Life & Health*, 440 U.S. at 231 (citing *Connell Construction*).

There is no conflict between the Sherman Act and the NLRA that demands the total ouster of antitrust from the collective bargaining relationship. Only a limited nonstatutory exemption—one that immunizes employer restraints on labor terms when embodied in a collective bargaining agreement—is faithful to this Court's precedents and fully effectuates both the antitrust and labor laws. The blanket immunity decreed by the majority below—immunity triggered by nothing more than the

employees' decision to engage in collective bargaining—will, in truth, frustrate the purposes of the NLRA by perverting the incentives for constructive collective bargaining.

I. THE SHERMAN ACT AND THE NLRA ARE FULLY HARMONIZED WHEN THE NONSTATUTORY LABOR EXEMPTION IMMUNIZES ONLY THOSE RESTRAINTS ON EMPLOYMENT TERMS THAT ARE CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS.

A. The Development of the Labor Exemption Demonstrates That Employee Consent Is Essential To Immunize Restraints on Employment Terms.

The derivation and application of the nonstatutory exemption demonstrate that *employee consent embodied in a written agreement* is required before the exemption will shield a concerted restraint on competition among employers over the substantive terms of employment.

1. *This Court Has Recognized Only a Limited Nonstatutory Exemption No Broader Than Necessary To Protect Employees' Interests in Bargaining Collectively for the Elimination of Competition Over Employment Terms.*

The NLRA embodies a congressional policy favoring collective bargaining to resolve labor disputes that would otherwise threaten industrial peace. *See* 29 U.S.C. § 151. The Act gives employees the right to organize for collective bargaining purposes, *see id.* §§ 151, 157, and imposes duties on labor organizations and employers to bargain in good faith over wages, hours and other terms and conditions of employment. *Id.* § 158(d). The "basic theme" of the NLRA is to promote collective bargaining "leading . . . to mutual agreement." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

Despite its name, the "nonstatutory" labor exemption actually derives from the statutory protections for labor contained in §§ 6 and 20 of the Clayton Act, 15 U.S.C.

§ 17 and 29 U.S.C. § 52 (exempting labor organizations from the Sherman Act and prohibiting courts from enjoining certain labor activities) and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (barring courts from prohibiting certain specified activities related to labor disputes). These protections—together the so-called "statutory labor exemption"—were enacted by Congress in response to early court decisions upholding antitrust actions against labor unions. *See Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 806 (1945); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).[9] The statutory labor exemption safeguards "the rights of labor to organize to better its conditions through the agency of collective bargaining." *Allen Bradley Co.*, 325 U.S. at 806.

The nonstatutory exemption is a narrow, judicially implied extension of the statutory protections for labor. Like the statutes from which it grew, "[t]he nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Construction*, 421 U.S. at 622. This Court recognized that an implied exemption was necessary because labor's statutory antitrust immunity protects only unilateral actions taken by labor organizations and not "agreements between unions and nonlabor parties." *Ibid. See H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713-15 (1981); *United Mine Workers v. Pennington*, 381 U.S. at 662; *Hutcheson*, 312 U.S. at 232.

The statutory exemption by its terms thus does not protect the fruit of the NLRA's bargaining regime—the

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[9] This Court upheld antitrust liability for union activities in the "Danbury Hatters' Case," *Loewe v. Lawlor*, 208 U.S. 274 (1908), and for the next three decades, the Sherman Act was successfully used to thwart strikes and secondary boycotts by labor organizations. *See, e.g., Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

collective bargaining agreement. This Court, however, has presumed that Congress intended to exempt collective bargaining agreements from the Sherman Act, since it would frustrate the policies of the NLRA and defeat the purposes of the statutory labor protections if collective bargaining agreements successfully concluded through labor-management negotiations were subject to attack as combinations in restraint of trade. *See Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreements* on these subjects.") (emphasis added); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an *agreement* is to stultify the congressional scheme.") (emphasis added).

Accordingly, the Court has held that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer *agreements* be accorded a *limited* nonstatutory exemption from antitrust sanctions." *Connell*, 421 U.S. at 622 (emphasis added). *See Pennington*, 381 U.S. at 664 (the nonstatutory exemption was designed to ensure "that a union may conclude a wage *agreement*" without violating the antitrust laws) (emphasis added).[10]

Just as the impetus for the exemption was to safeguard employees' labor law rights, the rationale for the exemp-

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[10] The exemption may also extend to other written agreements between labor organizations and employers that do not establish terms or conditions of employment—*i.e.*, agreements that are not collective bargaining agreements—where such agreements are necessary to implement the employees' labor law objectives. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905-06 (9th Cir. 1987) (Kennedy, J.).

tion does not support immunity for employers when they impose employment terms to which there is no employee "agreement." Reciprocal protection is required for employers as parties to collective bargaining agreements, since employers would otherwise face a strong disincentive to completing and abiding by such agreements and employees would again lose the benefits of collective bargaining. But when employers combine together as a group to impose labor terms unilaterally in the exercise of their own business interests, they are not entitled to protection under this Court's reasoning. Like the statutory exemption for labor, which applies only "[s]o long as a union acts in its self-interest," *Hutcheson*, 312 U.S. at 232, the nonstatutory exemption is no broader than necessary to shield restraints on labor competition that are successfully negotiated by employees "in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." *Jewel Tea*, 381 U.S. at 689-90 (opinion of White, J.).[11]

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[11] Where multi-employer groups have sought to exploit a bargaining relationship to further their own business interests, this Court has forcefully refused to immunize such conduct from antitrust review. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) ("benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires"); *Pennington*, 381 U.S. at 655 ("the law contemplates agreements on wages . . . between the union and employers in a multiemployer bargaining unit," but "because they must bargain does not mean that [they] may disregard other laws"). Indeed, only once, in *Jewel Tea*, *supra*, has the Court held a restraint that was embodied in a collective bargaining agreement immunized under the nonstatutory exemption. In *Connell*, *Pennington* and *Allen Bradley*, the Court upheld antitrust challenges to restraints that *were* embodied in agreements with labor organizations, including bargaining agreements.

2. *Following This Court's Precedents, Most Lower Courts Have Properly Immunized Multi-Employer Restraints on Employment Terms Only When Employees Have Agreed To the Restraints Through Bona Fide Collective Bargaining.*

The four cases in which this Court has construed the nonstatutory exemption all involved antitrust challenges to union conduct. *See Connell, Pennington, Jewel Tea, Allen Bradley, supra.*[12] In applying the principles developed in these precedents, however, numerous lower courts have addressed the exemption's possible application to labor restraints unilaterally imposed by employer groups like the NFL.

Until recently, the lower courts were unanimous in refusing to extend antitrust immunity to such restraints. Consistent with the strictly limited form of implied immunity recognized by this Court, the lower courts have correctly reasoned that the nonstatutory exemption shields anti-competitive employer restraints on labor terms and conditions only where such terms are the subject of labor-management agreements and are the product of good faith collective bargaining.[13] Most commentators, too,

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[12] *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), involved an antitrust action by unions challenging concerted employer conduct in the labor market. Although the employers raised the nonstatutory labor exemption, the Court held that the unions lacked antitrust standing and did not address the exemption issue. *Id.* at 539-42 & n.43.

[13] *See, e.g., Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1394 (9th Cir. 1987); *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 462-67 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 964-65 (D.N.J. 1987); *Zimmerman v. NFL*, 632

have supported this formulation of a strictly limited nonstatutory exemption coextensive with employees' consent.[14]

The panel's decision below, however, is one of three recent decisions in which courts have cut the judge-made exemption loose from its required mooring in employer-employee agreement. *See* Pet. App. 19a (rejecting any notion that "union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption") (emphasis in original). *See also National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137; *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). These courts' decisions expanding the exemption to cover any ongoing "collective bargaining relationship," Pet. App. 10a; *NBA v. Williams*, 45 F.3d at 693; *Powell v. NFL*, 930 F.2d at 1302, betray this Court's precedents and cannot be squared with the strict rules of statutory construction that govern the scope of such implied antitrust exemptions.

B. The Goals of the Sherman Act Are Promoted By Affording Antitrust Scrutiny To Restraints on Employment Terms Imposed By a Multi-Employer Cartel Without Employee Consent.

The limited nonstatutory exemption developed by this Court and most lower courts—an exemption that shields concerted multi-employer restraints on employment terms

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F. Supp. 398, 406 (D.D.C. 1986); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

[14] *See, e.g.*, Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617, 658-59; Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 376; Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 Harv. L. Rev. 874 (1991). *But see* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19 (1986).

only when they are contained in bona fide collective bargaining agreements—satisfies the basic principle of statutory construction that requires courts to give effect to the Sherman Act whenever possible. Thus limited, the exemption effectuates the Sherman Act by preserving as far as possible the application of antitrust law to labor markets.

The Sherman Act prefers competition wherever there exists an economically significant market for the provision or acquisition of goods or services. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990) (Sherman Act fully applicable to concerted restraints on competition for the provision of services).[15] Thus, but for its broad construction of the labor exemption, the Court of Appeals "recognize[d]" that petitioners would have a cause of action against respondents for their salary-fixing scheme. *See* Pet. App. 24a ("We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets."); *id.* at 35a-41a (Wald, J., dissenting).

The Sherman Act's reasonableness test is almost infinitely adaptable, applying as well to the *purchase* of goods or services as to their *sale*. As this Court's decisions have long shown, the Sherman Act does not codify any hard and fast demarcation between the labor market and other economically meaningful markets, *see e.g., Radovich v. NFL*, 352 U.S. 445 (1957); *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926); 2 Phillip

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[15] *See also National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978): "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.* at 695 (internal quotation marks and citation omitted).

Areeda & Donald F. Turner, *Antitrust Law* ¶¶ 338b & 338c (1978)—just as it draws no bright lines between different stages of the production process for goods or services, whether the purchase of inputs or the final sale of outputs, *see, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

In *Anderson v. Shipowners' Ass'n, supra*, the Court held that a member of a seamen's union could challenge under the Sherman Act uniform terms and conditions of employment imposed by associations of competing owners of merchant marine vessels. The associations imposed a registration requirement as well as other restrictions on the hiring and assignment of seamen, including an agreement to "fix the wages which shall be paid the seamen." 272 U.S. at 362; *see id.* at 361-62. The Court did not hesitate to conclude that such a combination would violate § 1. *Id.* at 364-65 (because "each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations," "it follows . . . that the combination is in violation of the Anti-Trust Act").

With direct significance to respondents and the market for professional sports services, the Court held in *Radovich v. NFL, supra*, that a former NFL player properly stated an antitrust claim for damages against the NFL clubs based on allegations that the clubs had colluded to blacklist him for playing in a rival league and violating his player contract. 352 U.S. at 446-48. Among other things the clubs were alleged to have restrained competition by "us[ing] a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract"—a restraint that was "enforced by agreement of the clubs to black-list any player violating [his contract] and to visit

severe penalties on recalcitrant member clubs." *Id.* at 449. The Court concluded that these restraints imposed by the NFL on competition for player services "are within the coverage of the antitrust laws," *id.* at 448, and "need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade," *id.* at 453 (internal quotation marks omitted). *Accord United States v. International Boxing Club*, 348 U.S. 236 (1955). *See also Flood v. Kuhn*, 407 U.S. at 284 (adhering to holding of *Radovich* that antitrust laws apply to restraints on labor market in professional football).[16]

As Judge Wald cogently explained in dissent below, *see* Pet. App. 39a-41a, economic theory fully supports application of § 1 to agreements among competing purchasers to fix the prices to be paid for labor and other inputs, particularly in industries such as professional sports and entertainment that are characterized by competitive bidding among employers for talented employees whose skills are highly differentiated. Where a group of employers, such as the NFL owners, comprises the only purchasers of the unique services of employees like professional football players or talented entertainers, salary collusion by the employers represents an exercise of monopsony power that robs employees of their fair market value and will inevitably result in a decline in the quality of the product sold to consumers. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 42-44, 72 (1993). *See also* Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981); *Mandeville Island Farms*, 334 U.S. at

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[16] *See also Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978) (NFL draft violates § 1); *Mackey v. NFL*, 543 F.2d at 616-18, 622 ("Rozelle Rule" restraint on player mobility violates § 1); *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992) (§ 1 applies to NFL "Plan B" restraints on free agency); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (refusing to dismiss antitrust challenge to NBA draft and reserve system); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (National Hockey League reserve clause violates antitrust laws).

240-43 (explaining the anticompetitive characteristics of collusive monopsony).[17]

Nevertheless, the majority below failed to make any effort whatsoever to give effect to the Sherman Act within the broad boundaries of the collective bargaining relationship. That the wholesale ouster of antitrust law announced by the majority below totally ignores the objectives of the Sherman Act is startingly apparent in this case where the NFL clubs' exercise of monopsony power cut the salaries paid to developmental squad players to less than one-fifth the level that would have prevailed absent the clubs' concerted elimination of competition.

C. An Exemption Based on Employee Consent Serves the Terms and Intent of the NLRA.

Firmly mooring the nonstatutory antitrust immunity to employee consent also fully comports with the terms of the NLRA and with congressional intent as construed in this Court's recent implied labor preemption decisions.

1. *A Consent-Based Exemption Protects Employees' Rights Under § 7 of the NLRA.*

Section 7 of the NLRA expressly grants employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. The statute also guarantees employees "the right to refrain from any or all of such activities." *Ibid.* The declared policies of the Act, moreover, include "protecting the exercise by workers of full freedom of association [and] self-organization" as well as "encouraging the practice and procedure of collective bargaining." *Id.* § 151.

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[17] Indeed, in the worlds of sport and entertainment, where the performer *is* the product, a competitive market for performers' services is conducive to consumer welfare because it stimulates the development of new talent and results in greater opportunity for performers to realize the best use of their talents. Employer collusion to eliminate competition and deny performers the market value of their services is thus directly harmful to the interests of fans.

Section 7 thus requires that all employees have a free and equal right to choose whether to organize for collective bargaining. In accordance with that clear statutory mandate, this Court has held that the NLRA will not tolerate any rule or policy judgment that predicates benefits or the legal rights of individual employees on the exercise of the § 7 right to organize or refrain from organizing. *E.g., Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994). In *Livadas*, the Court struck down a state policy that "placed a penalty on the exercise" of § 7 rights by forcing employees to choose between the enforcement of a state-law remedy and the § 7 right to collective bargaining. *Id.* at 2073, 2075. "This unappetizing choice," the Court concluded, "was not intended by Congress and cannot ultimately be reconciled with [the] statutory scheme" of the NLRA. *Id.* at 2075 (citation omitted).

The narrow form of implied antitrust immunity developed in this Court's labor exemption decisions promotes the terms and policies of § 7. If the employees' waiver of their individual antitrust rights occurs only when they collectively agree to employment terms through the consent of their bargaining representative, rather than upon the mere exercise of their § 7 right to engage in collective bargaining, the employees' exercise of the § 7 right to choose will remain free and unimpeded. *See* 114 S. Ct. at 2082 (state-law right to severance pay that "treated all employees equally, whether or not represented by a labor organization," and that was "relinquished . . . only by the parties' express agreement on different terms" was fully compatible with the NLRA) (discussing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987)). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("It would turn the [NLRA] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from [other legal rights].").

2. *The Limited Exemption Preserves the Legal "Backdrop" for Collective Bargaining That Congress Intended To Maintain.*

A consent-based exemption promotes the bargaining scheme of the NLRA for a second, closely related reason: As this Court's labor preemption decisions make clear, Congress intended collective bargaining to take place against the "backdrop" of generally applicable laws that affect union and nonunion employees equally without directly encouraging or discouraging collective bargaining. *See Livadas*, 114 S. Ct. at 2081-82; *Fort Halifax*, 482 U.S. at 21; *Metropolitan Life*, 471 U.S. at 757. The Court in *Livadas*, for example, specifically approved of lower court decisions holding that the NLRA forbids any attempt to deny union employees or employers the protection of generally applicable laws, such as trespass laws, even when such denial might lead to increased bargaining over labor disputes. 114 S. Ct. at 2081 (discussing *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1154 (4th Cir. 1992)). *See also New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 533 (1979) (opinion of Stevens, J.) (unemployment benefits law of "general applicability" not preempted by NLRA even though it provided special benefit scheme for strikers).

Employees are entitled to rely on the generally applicable legal backdrop unless and until they are able to secure preferable terms through bargaining.[18] Therefore, the Court has made it quite clear that in the event of a bargaining impasse, *the background legal standards come*

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[18] "Accordingly, it never has been argued successfully that minimal labor standards imposed by other federal laws were not to apply to unionized employers and employees." *Metropolitan Life*, 471 U.S. at 755. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (collective bargaining does not foreclose exercise of employee's anti-discrimination rights under Title VII); *In re Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334 (7th Cir. 1995) (NLRA does not preclude unionized employee from participating in OSHA safety inspection of employer's premises during pendency of strike).

into play. *See Fort Halifax*, 482 U.S. at 20-22. *See also Livadas*, 114 S. Ct. at 2081 (collective bargaining is not "served by forcing employees or employers to bargain for what they would otherwise be entitled to" under generally applicable laws).

This Court's decisions in *Radovich v. NFL* and *Anderson v. Shipowners' Ass'n*, *supra*, are sufficient to show that the requirements of the Sherman Act, like other forms of substantive federal regulation, are appropriately treated as part of the relevant "backdrop" of legal rights and obligations applicable in the context of collective bargaining between the NFL and the players. The Sherman Act is a generally applicable law that applies equally to unionized and nonunion labor markets and is not directly aimed at encouraging or discouraging collective bargaining. The Sherman Act protects from unreasonable restraint all meaningful competition over wages and other terms of employment where such competition is not foreclosed by a collective bargaining agreement. It requires in the present case that the salaries over which the players and the League will bargain, and which the clubs may impose upon impasse, may not start from a level that is collusively fixed by the clubs in a unilateral effort to eliminate competitive market forces.

The fact that the players may expressly *waive* their antitrust rights by a collective bargaining agreement in no way means that Congress intended the Sherman Act to apply with any less force than other background federal rights that cannot be waived. *Cf. Gardner-Denver*, 415 U.S. at 51 (Title VII civil rights are not waivable). Quite the contrary, in *Fort Halifax*, *supra*, the Court concluded that the waivability of a background right made the competing statutory scheme even *more* compatible with the NLRA. 482 U.S. at 22. If anything, that principle applies with greater force when the background law is a paramount federal statute like the Sherman Act.

II. THERE IS NO CONFLICT BETWEEN THE SHERMAN ACT AND THE NLRA THAT JUSTIFIES AN ANTITRUST EXEMPTION BASED ON THE MERE EXISTENCE OF A COLLECTIVE BARGAINING RELATIONSHIP, AND SUCH BLANKET IMMUNITY WOULD AFFIRMATIVELY HARM THE POLICIES OF THE NLRA.

The majority below followed the lead of the Second Circuit in *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995), and held that from "the inception of a collective bargaining relationship," Pet. App. 24a—that is, from the moment the players first exercised their § 7 right to form the Players Association—the players lost their remedies under the Sherman Act. There is no clear "repugnancy" between the Sherman Act and the NLRA that necessitates such blanket antitrust immunity for respondents' nonconsensual imposition of a fixed salary. In truth, this rule is actually contrary to fundamental policies of labor law and can only undermine the foundations of collective bargaining.

A. None of the Reasons Offered By the Court of Appeals Supports a Blanket Exemption for Unilateral Multi-Employer Restraints.

The court below based its decision on an assortment of supposed inconsistencies between the "process" of collective bargaining and the "[i]njecti[on]" of the Sherman Act into that process. *Id.* at 20a. These purported inconsistencies vanish upon inspection.

1. *A Judicial Desire To Adjust the Balance of Power Between Employees and Employers Is Not a Legitimate Basis for Ousting Antitrust Law.*

The majority believed that antitrust rights for unionized employees might disrupt "the delicate balance of countervailing power" between unions and employers "by giving unions a powerful new weapon . . . to gain an advantage

in bargaining." *Id.* at 19a-20a. Only Congress is empowered to make such a bold policy judgment. The NLRA flatly denies to courts (as well as to the NLRB) any "authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [an] assessment of that party's bargaining power." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965). *See also Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 418 (1982); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960). Accordingly, judicial views about the most desirable balance of bargaining power have no legitimate place in the exemption analysis. The Court of Appeals' attempt to calibrate this balance by giving employers an unlimited right to antitrust immunity overtly confers tremendous power in the opposite direction, toward employers—power that is arguably much greater than the bargaining power employees gain from the ability to file an antitrust suit, particularly since antitrust suits challenging restraints on competition for labor services have no guarantee of success.

What is more, this Court has repeatedly recognized that antitrust claims that arise during collective bargaining are *not* foreclosed by the NLRA. In *Connell Construction, supra*, the Court determined that an employer could pursue antitrust treble damages against a union while simultaneously seeking remedies from the NLRB for the union's alleged violations of § 8(e) of the NLRA, 29 U.S.C. § 158(e). The Court found nothing in the statute or its legislative history even "suggesting" that "Congress thought allowing antitrust remedies . . . would be inconsistent with the remedial scheme of the [labor laws]." 421 U.S. at 634. *See also Jewel Tea*, 381 U.S. at 687-88 (opinion of White, J.). *Accord Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982); *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 61 (1978).

2. *Collective Representation and Individual Antitrust Rights Are Not Mutually Exclusive.*

The majority below also reasoned that "[o]nce employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer," Pet. App. 24a, and this limitation implicitly precludes the employees from bringing an antitrust challenge based on the employers' collusive denial of individual negotiating rights. *See id.* at 24a-25a.[19]

Where there is no agreement on bargaining terms, however, there is no inconsistency between collective representation and the simultaneous pursuit of individual rights. That is plainly true in the NFL and other professional sports leagues, where players' associations have always acted to preserve the players' ability to negotiate their own individual salaries in a competitive market. This Court has stressed that employees may collectively "reserve a field for the individual contract," *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944), and that in industries like sports and entertainment, the "great variation in circumstances of employment or capacity of employees" makes it appropriate "for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." *Id.* at 338. That freedom to choose undermines any argument that collective bargaining necessarily precludes the exercise of individual antitrust rights to remedy a con-

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[19] The genesis of this argument—indeed, the genesis of the very rule of immunity adopted below and in *Williams*—is in Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971). *See id.* at 9. One of the co-authors of this article later became the author of the three Second Circuit opinions expanding the scope of the nonstatutory exemption. *See Williams, supra; Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995) (Winter, J.), *pet. for cert. filed*, No. 95-1012 (Dec. 20, 1995); *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987) (Winter, J.).

certed salary-fixing restraint unilaterally imposed by competing employers.[20] To the extent that competition remains in the unionized labor market by virtue of the employees' lack of consent to its elimination, antitrust law can protect it, just as antitrust law protects competition in nonunion labor markets.

3. *The Application of Antitrust Law To the Unilateral Imposition of Terms Will Not Interfere With Any Employer "Right" Protected By the NLRA.*

Next, the court reasoned that employers enjoy an affirmative "right" under the NLRA to act in concert to impose labor terms upon impasse, Pet. App. 23a, and that antitrust law would necessarily interfere with this right and therefore could not be allowed to intrude into the labor province. The court was mistaken.

The employers' ability to impose terms upon impasse is not a "right" conferred and protected by the NLRA. It is simply an exercise of the employers' residual, common law rights to operate their businesses. "Absent a collective bargaining agreement . . . state common law generally permits an employer to run the work-place as it wishes." *Fort Halifax*, 482 U.S. at 21. The common law generally recognizes an employer's unilateral right to alter employment terms, including wages.[21] Although the employer's and the employees' bargaining representatives

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[20] *See also* Jacobs & Winter, *supra*, at 9-10 (one "important qualificatio[n]" to the argument advanced by the majority below is that "while the concept of an exclusive bargaining representative forecloses individual bargaining at the option of individual employees, it does not foreclose the collective bargain from leaving certain issues to be resolved by individual bargaining").

[21] *See, e.g., Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 559 (N.J. 1994); *Sanchez v. Life Care Ctrs.*, 855 P.2d 1256, 1259 (Wyo. 1993); *German v. Commonwealth*, 574 N.E.2d 336, 339 (Mass. 1991); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986); *Facelli v. Southeast Mktg. Co.*, 327 S.E.2d 338, 339 (S.C. 1985).

"may enter negotiations designed to alter this state of affairs, . . . if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions." *Fort Halifax*, 482 U.S. at 21.[22] The majority's decision inequitably allows the NFL clubs to exercise their "backdrop" right to make unilateral changes in employment terms but precludes petitioners from exercising rights that they equally enjoy under the backdrop of applicable law. Since the League's "right" to impose the fixed salary on petitioners derives from the common law rather than the NLRA, subjecting the exercise of that right to the requirements of the Sherman Act presents no more of a conflict with the labor law than did subjecting the employer's right of post-impasse implementation to the state severance pay law in *Fort Halifax*.

The majority asserted that unilateral implementation is a core "economic weapon" available to the employers, no different from lockouts or other economic pressure tactics that are integral to the bargaining process. Drawing by analogy on *Machinists v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 141 (1976), the court reasoned that unilateral implementation is among the core economic weapons that Congress intended to leave unregulated, even from antitrust review. Pet. App. 5a, 18a, 23a.

That is precisely the reasoning this Court discredited in *Metropolitan Life, supra,* when it rejected the proposition that a "law that interferes with the end result of bargaining is . . . even worse than a law that interferes with the bargaining process." 471 U.S. at 752. Refusing to hold preempted a state law that established a minimum term of employment, the Court drew a clear

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[22] "Impasse" is defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (internal quotation marks omitted).

line between the "bargaining process" and the "end result of bargaining." *Ibid.* The Court held that there is "[n]o incompatibility" between the NLRA and "state or federal legislation that imposes minimal substantive requirements on contract terms." *Ibid.*

As Judge Wald demonstrated, Pet. App. 53a-54a, economic weapons like strikes and lockouts are qualitatively different from unilateral employer action, such as, for example, an employer's permanently subcontracting out certain jobs or permanently changing the terms of employment for its own employees who perform those jobs. Strikes and lockouts are means to the end; they almost always stimulate the bargaining process by bringing the parties back to the table, in part precisely because these tactics are painful for *both* sides. In sharp contrast, the unilateral imposition of the employers' preferred terms is an end in itself, principally designed to serve the employers' business interests rather than to influence the bargaining process. Although certainly painful to employees, it imposes no reciprocal costs on the employers and is thus a one-sided substitute for a bargaining agreement, not a tactic calculated to spur the parties to constructive compromise. In the present case, indeed, respondents have never even tried to claim—nor could they plausibly do so—that the concerted imposition of a $1,000 per week salary for developmental squad players was designed to draw the Players Association back to the bargaining table.

Thus, with direct relevance to the imposition of terms at impasse, the Court held in *Fort Halifax, supra,* that a state severance pay requirement was not preempted even though it specifically applied by its terms in the event unionized employers and employees reached impasse in collective bargaining. 482 U.S. at 21. Although the state law provided statutory minimum terms that presumably overrode the employers' ability to impose their own proposals upon impasse, the Court nevertheless concluded that the statute did "not impermissibly intrude

upon the collective bargaining process." *Ibid.* *Fort Halifax* negates the Court of Appeals' logic, yet the majority did not even mention the case.

4. *Multi-Employer Bargaining Is Not Threatened By an Antitrust Exemption Limited To Consensual Restraints on Labor Terms.*

Finally, drawing liberally from the *Williams* opinion, the majority below concluded that antitrust law is incompatible with the NLRA because it would hamstring multi-employer bargaining in contravention of congressional intent. Pet. App. 25a-29a (quoting *Williams*, 45 F.3d at 689-92).[23] According to *Williams*: (1) multi-employer bargaining has long been "commonplace and essentially unchallenged," 45 F.3d at 688; (2) Congress approved of membership in employer organizations in 29 U.S.C. § 104(b); (3) to be effective, a multi-employer association must "jointly establish and maintain a unified front in dealing with a common union," *id.* at 689; and (4) in *NLRB v. Truck Drivers Local No. 449 ("Buffalo Linen")*, 353 U.S. 87 (1957), this Court upheld the NLRB's ruling that the members of an employer association do not commit an unfair labor practice by locking out their employees in response to a "whipsaw" strike by a union, *id.* at 694.[24] Stringing together these premises, the Second Circuit jumped to the conclusion that in enacting the labor laws, Congress must have intended to preclude application of antitrust review to all concerted labor market activities of multi-employer associations. *Id.* at 690-92.

In truth, however, there is no basis for concluding that multi-employer bargaining necessarily trumps any and all requirements of the Sherman Act, nor is the collective

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[23] This argument, too, had its origin in the Jacobs & Winter article. *See* 81 Yale L.J. at 22.

[24] A "whipsaw" strike occurs when a union strikes individual members of a multi-employer bargaining unit separately in order to put maximum economic pressure on the employers.

bargaining scheme of the NLRA threatened in any way by a rule that subjects to antitrust scrutiny restraints on employment terms that are unilaterally imposed by a multi-employer group.

The labor laws provide no statutory underpinning for the *Williams* reasoning. The only labor provision remotely applicable to the issue before the Court is § 4(b) of the Norris-LaGuardia Act, 29 U.S.C. § 104(b), which merely bars the issuance of injunctions prohibiting any person from becoming or remaining a "member of any labor organization or of any employer organization." Section 4(b) may protect membership in multi-employer organizations and even the ability of the employer-members to commit themselves jointly to a common bargaining position, but it does not imply any intent by Congress to protect joint conduct by employers to restrain competition over terms of employment.

Indeed, the *Williams* analysis collides head-on with the legislative history of the Norris-LaGuardia Act, which refutes any notion that Congress intended a broad repeal of the antitrust laws for all bargaining conduct by multi-employer associations. In adopting the Norris-LaGuardia Act, including its prohibition on injunctions against membership in employer organizations, Congress overwhelmingly defeated a proposed amendment that would have granted employers "full freedom of association [and] self-organization" for their own "mutual aid or protection," 75 Cong. Rec. 4762 (1932) (proposal of Sen. Hebert on behalf of the minority of the Senate Judiciary Committee). Senator Norris, the chief sponsor of the Act, criticized the amendment on the ground that it might invite employers to claim that "Congress [had] relieved them from all responsibility of organization under the Sherman Anti-trust Act." *Id.* at 4764. Other members of the Judiciary Committee expressed similar concerns. *See id.* at 4765 (statement of Sen. King) (the proposed language "[c]ould be construed to mean that

employers had the right to combine, and in such a manner as would be violative of either the Clayton or the Sherman antitrust laws"); *id.* at 4763 (statement of Sen. Walsh) ("Of course, employers ought to have perfect freedom of association, so long as they do not trench upon the Sherman Act."). Immediately following this debate, the amendment was roundly defeated, suggesting that Congress quite clearly did not intend for multi-employer bargaining by itself "to relieve employers of any liability under the antitrust laws." James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. Penn. L. Rev. 127, 153 (1982).

Notwithstanding the absence of a blanket immunity for all actions taken by multi-employer bargaining associations, this kind of bargaining relationship has become commonplace. In the context of professional sports and entertainment, where organized employees exercise the right afforded by labor law to preserve areas for individual negotiations, *see J.I. Case, supra,* the availability of antitrust remedies has fostered constructive bargaining settlements between the two sides. In the more traditional bargaining context, where labor organizations seek standardized industry-wide compensation terms, post-impasse implementation of employment terms by employer associations has not elicited significant antitrust challenge to date and is unlikely to do so in the future. The reason is that the employees as well as the employers in those industries accept the legitimacy of common employment terms for all employees (however much they may disagree about the specific figures).

Reversal of the Court of Appeals' decision is thus unlikely to spur employer withdrawal from salutary multi-employer bargaining relationships based on supposed fears that post-impasse implementation might now engender antitrust claims. Were such fears to be voiced by employer associations, labor organizations that seek standardized industry-wide terms could presumably enter into agreements that assuage those fears.

Absent employee acceptance of *concerted* employer action, subjecting employment restraints to antitrust scrutiny when they are unilaterally imposed by a group of employers is hardly a wholesale assault on multi-employer bargaining, as the *Williams* court believed. *See* 45 F.3d at 692. The rule petitioners suggest is concerned exclusively with employment terms; it will not interfere with the process of multi-employer bargaining or deny employer associations the use of economic weapons. At impasse, each individual member of the employer association retains its ability unilaterally to implement its own preferred employment terms *without fear of antitrust liability,* since it is only the *collusive* imposition of restraints that runs afoul of the Sherman Act. In addition, the employers could always collectively impose a *reasonable* restraint on labor competition, since the Sherman Act proscribes only those that are *unreasonable.*

In line with *Machinists* and this Court's more recent labor preemption cases, members of a multi-employer bargaining unit retain a panoply of economic weapons that they can exercise collectively free of antitrust scrutiny. *See* Pet. App. 53a-54a n.7 (Wald, J., dissenting). In addition to their ability to commit themselves to joint bargaining positions, they can lock out their employees upon impasse as a defensive measure to protect the integrity of the unit, they can hire replacement workers during such a lockout, and they can contribute to a strike insurance fund.[25] Furthermore, no antitrust liability would arise if the employers acted together upon impasse to withdraw certain benefits contained in an expired bargaining agreement, such as, for example, a minimum salary requirement that may pose an impediment to unilateral action.[26]

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[25] *See NLRB v. Brown,* 380 U.S. 278, 285 (1965); *Buffalo Linen,* 353 U.S. at 97.

[26] As established in *Fort Halifax,* the employers' common law right to withdraw employment benefits after impasse, just like their

Finally, it certainly was not necessary to respondents' multi-employer bargaining efforts to immunize their imposition of the fixed-salary restraint in the present case. Each of the respondent clubs could have separately determined to pay a flat salary for its developmental squad players consistent with the Sherman Act, as long as the League did not act as a cartel to enforce those terms. In addition, the individual clubs were free after impasse to negotiate their own agreements on an interim basis with the Players Association. *Bonanno Linen,* 454 U.S. at 415-16 n.9.

All of these options provide sufficient flexibility for employer associations to bargain jointly for the terms they want. There is simply no clear repugnancy between the Sherman Act and labor law's recognition of multi-employer bargaining that requires the employers to be free to act in restraint of trade by imposing their preferred terms unilaterally as a group.

B. A Blanket Exemption Like That Adopted Below Would Stifle Collective Bargaining and Corrode Labor-Management Relations.

The perverse and destructive incentives that would follow from the labor exemption contemplated by the Court of Appeals are manifest. On the one hand, the exemption would give employers a compelling disincentive against good faith bargaining. Multi-employer associations would be able to impose their own preferred industry-wide employment terms free of any market constraints and without giving up any *quid pro quo* in the bargaining process. Employers would merely have to force labor negotiations to impasse by "going through the motions of bargaining," Pet. App. 47a n.6 (Wald, J., dissenting) (internal quotation marks omitted), since they would have a greater stake in bringing about an impasse than in coming to terms with the employees'

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common law right to impose terms, is always subject to whatever background laws are otherwise applicable to employment terms.

bargaining representative. At the same time, employers would have a perverse interest in fostering and promoting a unionized work force, solely for the purpose of maintaining their antitrust immunity and not out of any fidelity to the goals of the labor laws.

On the other side of the balance, blanket antitrust immunity that is tied to the mere existence of a collective bargaining relationship would place overt pressure on employees to abandon collective bargaining altogether. Where industry-wide employer restraints are sufficiently oppressive, abandoning the bargaining table in favor of the courthouse may be the employees' only effective recourse. That is not merely a hypothetical concern. In the wake of the Eighth Circuit's decision in *Powell v. NFL*, for example, the NFL players promptly decertified the Players Association and went without a collective bargaining agreement for a total of six full seasons while pursuing their antitrust remedies against the League. *See* Pet. App. 30a, 48a. Short of dismantling their association, however, employees would have no choice but to capitulate to the employers' immunized terms, or else take the risk of calling a strike, where the chance of success would be lessened by the absence of any threat of antitrust liability.

As shown, the Court of Appeals' automatic elimination of antitrust rights triggered solely by the employees' decision to engage in collective bargaining is impossible to square with § 7 of the NLRA. *Livadas*, 114 S. Ct. at 2075. *See Metropolitan Life*, 471 U.S. at 756. Indeed, on the facts of the present case, the penalty produced by this rule is particularly stark. Petitioners are a narrow class of practice players who lack majority status and significant clout within the Players Association. They are in no position to force the association to decertify to allow them to pursue their antitrust remedies against respondents—the fanciful option offered by the majority below. *See* Pet. App. 30a.

The incentives created by this total ouster of antitrust cannot help but have a pernicious effect on labor relations in industries organized around multi-employer bargaining, particularly the sports and entertainment industries, where employment terms are individually negotiated within the structure of a collective bargaining relationship. The track record in the sports world in recent years provides a particularly dismal forecast for what will likely come if the Court of Appeals' rule is not reversed. The tumultuous history of the NFL Players Association suggests that under the majority's rule below, labor relations in football may be relegated to a disruptive pattern of bargaining, impasse, decertification, antitrust litigation and settlement, repeated again and again with each contract cycle. That result makes a mockery of the NLRA policy that favors collective bargaining as a means to minimize industrial strife. *See* 29 U.S.C. § 151.

Other sports too can be expected to experience greater labor unrest as a byproduct of the Court of Appeals' decision. In response to the *Williams* opinion, the National Basketball Association owners imposed a lockout in the summer of 1995, and a large faction of NBA players mounted an ultimately unsuccessful attempt to decertify their association. Prior to *Williams*, the NBA had concluded several successive bargaining agreements without a strike or lockout.[27] In the National Hockey League, the owners refrained from unilaterally imposing a proposed league-wide salary cap during a lockout in the 1994-1995 season precisely because of their concern over the potential for antitrust liability. As a result, the players and the owners eventually concluded an agreement that did not include such a restraint.[28] Under

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[27] *See* John Helyar, "Power Plays: Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute," Wall St. J., Aug. 7, 1995, at A1.

[28] The majority below pointed to the NHL as evidence that bargaining agreements can be reached in professional sports without resort to antitrust litigation, Pet. App. 31a-32a, but that observa-

the Court of Appeals' rule, the NHL owners would have had considerably less incentive to bargain with the players to reach a mutual agreement.

Major league baseball provides the most compelling example. Baseball has long been subject to its own peculiar antitrust exemption as a matter of *stare decisis*. *Flood v. Kuhn*, 407 U.S. 258 (1972). The baseball players' lack of antitrust rights has not produced peaceful labor relations, to say the least. There have been eight rounds of contract negotiations in baseball since 1970, and every one has involved a strike or lockout. The latest baseball strike was the longest work stoppage in professional sports history—to the detriment of fans as much as players and owners—and there is still no agreement in sight.

Similar dislocations can be expected to follow in the entertainment industry. The labor structures in entertainment—involving individual negotiations for talent within the framework of industry-wide collective contracts—are similar to those in sports. And the potential is great for agreements and combinations among production companies that are aimed at suppressing competition for talent and artificially limiting the compensation received by those with the least bargaining power.

If this Court were to adopt the blanket exemption crafted by the majority below, all unionized sports and entertainment employees, as well as the employees in other industries with similar structures, would suddenly find

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tion was sorely mistaken. In fact, the NHL owners themselves have acknowledged the important role that antitrust played in the negotiations. *See* Joe Gordon, "NHLPA Eyes Suit; Owners May Hear Antitrust Charge," Boston Herald, Dec. 25, 1994, at B24 (" 'At the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade.' ") (quoting Harry Sinden, President-General Manager of the Boston Bruins).

themselves in the same "aberration[al]" antitrust vacuum heretofore inhabited only by baseball. *Flood v. Kuhn*, 407 U.S. at 282.

III. WHERE ANTITRUST IMMUNITY HAS PROPERLY ATTACHED TO EMPLOYMENT TERMS IN A COLLECTIVE BARGAINING AGREEMENT, THE IMMUNITY SHOULD END WITH EXPIRATION OF THE AGREEMENT.

There is no dispute in this case that the Players Association refused to approve the fixed salary for developmental squad players and that respondents' concerted imposition of the $1,000 per week salary was entirely unilateral—triggered as it was by the League's own conclusion that negotiations on the issue had reached impasse. The labor exemption thus cannot properly shield this challenged restraint, and the decision of the Court of Appeals should be reversed.

In deciding this case, the Court should not fail to consider what has become the most important and recurring issue with respect to the labor exemption: the issue of the exemption's expiration.[20] Consistent with the rationale limiting the exemption to restraints on employment terms that receive employee consent as expressed through the terms of a bargaining agreement, the expiration of such an agreement is the proper point for the termination of the implied antitrust immunity. The expiration date agreed to by the parties in their labor contract is the only reliable and legitimate indication of the duration of the employees' consent to the contract's terms.

Contract expiration is a definitive point free of the uncertainty and legal limbo often associated with the determination of impasse. If the exemption ends with the contract, the parties will mutually control the precise

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[20] *See* Note, *Releasing Superstars From Peonage*, 104 Harv. L. Rev. at 886.

scope of their rights, and would be able to bargain specifically for a separate extension or modification of the immunity. Under an impasse test, in contrast, the employers—the very parties who have presumably restrained competition in violation of the Sherman Act—can exercise considerable control over the duration of their own immunity. Moreover, limiting the exemption to the period of the bargaining agreement also gives maximum effect to both the NLRA and the Sherman Act, as required by the principles of statutory construction discussed above. *See Silver v. New York Stock Exchange*, 373 U.S. at 357 (antitrust exemption should be implied "only to the minimum extent necessary").

Lifting the antitrust bar upon expiration will not frustrate the NLRA's bargaining scheme.[30] The prospect of antitrust liability following expiration of the agreement does not conflict with the employers' labor law duty to maintain the status quo until negotiations over a new contract have reached impasse, *see NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). The *Katz* status quo doctrine does not preserve contract terms concerning other mandatory subjects of bargaining, such as arbitration, that represent "a consensual surrender" of rights the parties would otherwise be free to exercise. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (internal quotation marks omitted). *See also Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113-14 (D.C. Cir. 1986) (*Katz* does not apply to union security and dues check-off provisions). In *Litton*, the Court reasoned that, however valuable grievance arbitration may be to employees, since arbitration is "a matter of consent" that involves the relinquishment of the right to a trial in court, the requirements of the provision "will not be imposed upon parties beyond the scope of their agreement." 501 U.S. at 201. So also the employers' immunity for restraints under the labor exemption is "a matter

[30] *Cf.* Pet. App. 22a; *Bridgeman v. NBA*, 675 F. Supp. at 965-66.

of consent" that involves a surrender of the employees' antitrust rights. Under the same reasoning, the exemption should not be imposed on employees "beyond the scope of their agreement."

In any event, *Katz* presents no dilemma for the employers: If the employees through their bargaining representative have told the employers that they want a contract restraint removed immediately at the end of the collective agreement, the employees can hardly charge the employers with bad faith bargaining in violation of § 8 (a)(5) (the basis for the *Katz* status quo doctrine) for having removed the restraint prior to impasse.[31] If negotiations are advancing toward a new contract, moreover, the employees are likely to consent to an extension of the employers' immunity. And as was explained earlier, individual employers, acting on their own, would be able to maintain salary restraints like the one involved in the present case without thereby incurring antitrust liability; they simply could not do so collectively without having to justify the reasonableness of the restraint under the Sherman Act.

For these reasons, the exemption should lapse when the agreement expires, provided the employees through their bargaining representative have made it clear that they no longer want the challenged restraint maintained.

Even if the exemption were deemed to survive the expiration of a bargaining agreement, in no event could the exemption properly extend beyond impasse in negotiations over a successor contract. Once impasse has been reached, employers are no longer required to maintain the status quo. *See Bonanno Linen*, 454 U.S. at 415-16 n.9. They fall back on their common law rights, the exercise of which is ordinarily subject to antitrust scrutiny. Competitive restraints subsequently enforced by the employers

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[31] *See NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25 (1949); Note, *Releasing Superstars From Peonage*, 104 Harv. L. Rev. at 892-93.

are not the product of bona fide collective bargaining and do not have the consent of the employees. The Eighth Circuit's contrary holding in *Powell v. NFL* demonstrates the baleful consequences of an indefinite rule of post-impasse immunity, which differs little in substance from the rules adopted by the D.C. Circuit in this case and the Second Circuit in *Williams*. The football players acted to decertify the Players Association within days of the *Powell* decision, thus starkly disproving the Eighth Circuit's unsupported presumption that the "Right of First Refusal/Compensation" system challenged in that case was "clothed with union approval," 930 F.2d at 1302 (internal quotation marks omitted).

Accordingly, the exemption must terminate at the very latest upon impasse. In the present case, regardless of whether the exemption ends at impasse or upon expiration of a bargaining agreement, it can provide no immunity for respondents' unilateral imposition of their salary-fixing scheme.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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